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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

MARK EILRICH,
Petitioner,

VS.

BERNARD J. REMAS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an unreviewed determination of a city hearing officer bar a federal district court from independently deciding the legal question whether speech by a public employee on a matter of public concern is protected by the First Amendment?

2. Was a city hearing officer's determination that each individual statement made by a public official was not protected by the First Amendment identical with the legal issues raised in petitioner's 42 U.S.C. § 1983 action so as to require application of the doctrine of collateral estoppel?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Mark Eilrich and the respondents Bernard J. Remas, Charles Neal, Sherman Porter, Ray Safreno, Philip Overholtzer, David White, Gene Robirds, and the City of Riverbank, California. The parties in this Court are the same.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARK EILRICH, Petitioner,

v.

BERNARD J. REMAS, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mark Eilrich respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on February 17, 1988.[1]

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[1] Petitioner does not urge the second question presented as a reason for granting the writ, but he seeks to reserve the issue for resolution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 839 F. 2d 630. It is reprinted beginning at page 1 in the Appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 17, 1988. No petition for rehearing was filed. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Const., Amend. I:

Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition Government for a redress of grievances.

Title 42 U.S.C. § 1983 (1982):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Mark Eilrich, was a police officer employed by the respondent, City of Riverbank, California.[2] As secretary-treasurer of the Riverbank Police Officers' Association he read a statement to the city council during the public business portion of its meeting on November 13, 1984. (C.R. 32, Exhibit B; Excerpt at 77.)[3] The speech was critical of

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[2] Respondent Remas was the chief of police, respondent Robirds was the city administrator, and the remaining respondents were each members of the City of Riverbank city council.

[3] Throughout this Petition the Clerk's Record is referred to by number of document as "C.R. "The Excerpt of Record filed with the Court of Appeals is referred to as "Excerpt."

respondent Remas, the Chief of Police, and concerned an ongoing dispute between the Association and chief Remas, including a unanimous "no confidence" vote by the members of the police association and alleged wrongdoing by the chief. (C.R. 32, Exhibit B, Excerpt at 79; C.R. 40, Exhibit A, Excerpt at 272.) The speech resulted in petitioner's termination from the police department on November 21, 1984. (C.R. 1, Exhibit A, Excerpt at 11-13; C.R. 32, Exhibit A, Excerpt 63-65.)

The statement read to the council included the following individual comments which were the basis for the discharge:

> 1. "Chief Remas has recently commented in the local news media, in response to our publicly made unanimous 'no confidence' vote of his ... management practices, that it is his belief that the

Riverbank Police Department is currently 'strong and viable' as an organization. It is our equally strong belief, as the actual members of the organization which he is describing, that his contention is simply false."

2. "Over the past several years it has been the policy of the Chief of Police to cause dismissal of traffic citations in the interest of justice."

3. "This practice is an unethical use of the Chief's power for his own personal or political purposes."

4. "There's been a misappropriation of public funds or time by favored members of the Police Department and although this was brought to the attention of the Chief of Police, no action was taken."

5. "Since our attendance at the last Council meeting and resulting local publicity, members of our association have been threatened with job action if they persisted in communicating with the media."

6. "There have been grievances filed through the Chief of Police up to the City

Administrator, and not on every particular item."

The City alleged that the statements constituted (1) insubordination; (2) dishonesty; and (3) failure to follow specific grievance procedures. (C.R. 1, Exhibit A, Excerpt at 11-13; C.R. 32, Exhibit A, Excerpt 63-65.) Petitioner appealed his termination to the city administrator who subsequently assigned the matter to a hearing officer. The hearing officer, a retired California Superior Court judge, held a 14-day judicial type administrative proceeding. (C.R. 32, Exhibit F, Excerpt at 193 et. seq, Excerpt at 262 et seq.)

On May 1, 1985, the hearing officer found that the City had not proved that petitioner violated the City Rules by speaking to the city council rather than following the formal grievance

procedures. However, he upheld the termination on the grounds of insubordination and dishonesty. The hearing officer determined that petitioner's statements were not protected by the first amendment. (C.R. 32, Exhibit F, Excerpt at 193 et. seq.) The hearing officer's decision was subsequently ratified by the city council. (C.R. 5, Excerpt at 15.)

Petitioner did not seek review of the hearing officer's decision in the California state courts. Cal. Code Civ. Pro. §§ 1094.5, 1094.6 (West, 1980). Instead, he sought review pursuant to 42 U.S.C. § 1983 (1982) in the United States District Court for the Eastern District of California by filing a timely complaint on November 14, 1985, contending, among other things, that the termination violates the first amendment

because it is based upon his speech to the city council. (C.R. 1, Excerpt at 1.)

Respondents moved for summary judgment based on this Court's opinion in University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed 2d 635, 106 S.Ct. 3220 (1986). (C.R. 32, Excerpt at 29) Respondents asserted that petitioner was barred from pursuing the section 1983 action because the California state courts would give collateral estoppel effect to the city hearing officer's prior unreviewed determination. People v. Sims, 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321 (1982). Petitioner contended that the question of whether, under the circumstances, his speech was protected by the first amendment is a question of law (Connick v. Myers, 461 U.S. 138, 148 n.7, 150 n. 10 (1983))

which is not the sort of "finding of fact" entitled to final preclusive effect under federal common law rules. Petitioner further argued that Elliott does not extend to findings of local municipalities, and that the issues decided by the hearing officer were not identical to the issues raised in the § 1983 action. Believing itself bound by the holding in Elliott, the district court granted summary judgment, which was entered on November 12, 1986.[4] Appendix at p. 52.

On November 20, 1986 petitioner filed a timely notice of appeal pursuant to 28 U.S.C. § 1291 (1982). On February 17, 1988 the court of appeals affirmed the judgment. Eilrich v. Remas, 839 F.2d

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[4] The district court's opinion is reproduced in the Appendix beginning at page 26.

630 (9th Cir. 1988). The court found that "The district court did not abuse its discretion in precluding relitigation of Eilrich's first amendment issue in the § 1983 action because the municipal administrative proceeding would have been given collateral estoppel effect under California law." 639 F.2d at 633, Appendix at 14-15. The court held that Elliott barred petitioner's § 1983 action, that Elliott applies to municipal agencies, and that Elliott applied to conclusions of law of state administrative agencies.

Petitioner did not seek rehearing in the court of appeals.[5]

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[5] Justice Kennedy served on the original panel that heard argument in the case. He was replaced by Judge O'Scannlain after he was appointed to this Court.

REASONS FOR GRANTING THE WRIT

I. The Extension of Common Law Rules of Issue Preclusion to Local Agency Determinations that Speech is Not Protected by the First Amendment Presents an Important Conflict with this Court's Many Decisions Holding that Whether Speech is Protected By the First Amendment is a Legal Question Subject to Independent Review.

This Court has repeatedly held that the question whether speech is constitutionally protected presents a question of law, not an ordinary finding of fact. See Rankin v. McPherson, 483 U.S. ___, 97 L.Ed.2d 315, 325, 107 S.Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138, 150 n.10, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983); Pennekamp v. Florida, 328 U.S. 331, 335, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946). In University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed 2d 635, 106 S.Ct. 3220 (1986), the Court extended the common law doctrine of issue

preclusion to unreviewed findings of fact of state agencies. Whether the common law preclusion doctrine developed in Elliott prevents federal judges from deciding the question of law concerning the alleged violation of first amendment rights deserves the attention of this Court.

Mark Eilrich was fired for giving a speech to the City of Riverbank city council during the public business portion of a council meeting. No court has ever determined whether petitioner's termination was lawful; nor has a court decided whether petitioner's discharge violates the first amendment. Thus, this case does not involve application of the Full Faith and Credit statute to a judgment of a state court. 28 U.S.C. § 1738; Migra v. Warren City School District Bd. of Ed., 465 U.S. 75, 79

L.Ed.2d 56, 104 S.Ct. 892 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982). Instead, the case concerns the conflict between the objectives of the preclusion doctrine -- enforcing finality -- with the time honored first amendment doctrine, which traditionally has given courts, including this Court, the final responsibility to exercise "independent judgment" (Bose Corporation v. Consumers Union, 466 U.S. 485, 505, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984)) to decide that a legal determination "does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, 376 U.S. 254, 285, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964). The doctrine, which characterizes questions concerning application of substantive first amendment principles as questions of law,

has been applied in a wide variety of contexts. See Bose, 466 U.S. at 504-510, and cases cited. In recent years the doctrine has consistently been applied to public employee free speech cases. Rankin v. McPherson, supra; Connick v. Myers, supra.

Thus, this Court has characterized the inquiry in each particular situation whether speech is protected by the first amendment as a "question of law", Rankin, 97 L.Ed.2d at 325 n. 9; Connick, 461 U.S. at 147 n. 7, 150 n.10, or "constitutional fact" as in Bose, 466 U.S. at 508 n. 27. Throughout the opinions the principle emerges that initial determinations in first amendment cases simply do not bear the same deference and finality as other types of factual and constitutional determinations. Bose v. Consumers Union, supra. Hence the interests in finality

and repose -- which ordinarily support the doctrine of collateral estoppel -- are not as strong as they are in ordinary types of litigation.

Despite the extension of issue preclusion to § 1983 cases, this Court has indicated and held that judge made rules of issue preclusion will not apply when other competing values outweigh the principles furthered by rigid application of the collateral estoppel doctrine. "Other factors, of course, may require an exception to the normal rules of collateral estoppel in particular cases." Allen v. McCurry, 449 U.S. 90, 95 n. 7, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980). Haring v. Prosise, 462 U.S. 306, 313 n. 7, 76 L.Ed.2d 595, 103 S.Ct. 2368 (1983); McDonald v. City of West Branch, 466 U.S. 284, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984). See, United States v. Mendoza,

464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (1984).

In fact, this Court's opinion in Elliott holds, in part, that Congress intended a trial de novo in federal court on unreviewed Title VII claims (42 U.S.C. § 2000e-5(b)) which had previously been adjudicated by state administrative agencies. This exception to the usual preclusive effect given to unreviewed state agency determinations was based on the intention of Congress as expressed in the legislation.[6] 92 L.Ed.2d at 644-45.

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[6] In Elliott this Court found congressional intent sufficient to override the preclusion doctrine. Surely, the first amendment's procedural requirements provide at least as strong an interest to override the judge made rules of preclusion which otherwise give collateral estoppel effect to the conclusions of state administrative agencies.

In Patsy v. Board of Regents, 457 U.S. 496, 506, 73 L.Ed.2d 172, 102 S.Ct.

(continued...)

Freedom of speech is one of the most important rights we possess as Americans. As this Court recently reiterated "'[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.'" Hustler Magazine v. Falwell, 485 U.S. ___, 99 L.Ed.2d 41, 49, 108 S.Ct. ___ (1988). The proper adjudication and protection of these rights is what makes the first amendment a living instrument of democracy. See, Bose v. Consumers Union, supra.

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[6](...continued)
2557 (1982) this Court recognized that Congress itself had expressed "mistrust", when it enacted the statute that became section 1983 "for the factfinding processes of state institutions." Although this mistrust might be insufficient to override issue preclusion in an ordinary § 1983 case, Elliott, supra, the mistrust coincides with the constitutional policy of independent review embodied in this court's first amendment jurisprudence.

Whether the adjudication of first amendment rights can be barred by the federal courts and relegated to local agencies whenever a claimant attempts to exhaust available remedies in a local forum and then seeks federal review affects the vitality of the first amendment as well as the proper and orderly administration of justice.

As the court of appeals for the second circuit once observed: "[C]onstitutional issues, ..., particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators." Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). Consistent with this observation, this Court carefully and repeatedly limited its holding in Elliott that issue preclusion applies in § 1983 cases to unreviewed decisions of administrative

agencies to "fact-finding of administrative bodies", "disputed issues of fact", and "administrative factfinding." 92 L.Ed.2d at 645-46 (emphasis added).[7] Thus the conflict with the court of appeals in this case should be resolved by confining Elliott to traditional "factfinding" determinations as opposed to the special constitutional doctrine involved in first

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[7] See, Gjellum v. City of Birmingham, 829 F.2d 1056, 1068 (11th Cir. 1987):

"Allen [v. McCurry, supra] itself left little room for a restrictive construction. The Court's opinion in Elliott, by contrast, is couched in terms of preclusion based upon administrative agency factfinding. Although the federal courts generally have yet to decide what type of "factfinding" the Elliott Court had in mind, the contrast between the Court's restrictive terminology in Elliott and the broad language in Allen suggests that Elliott was intended to establish a much narrower rule of preclusion."

amendment questions of law which bear a lesser degree of finality than ordinary factual determinations.

Whether the first amendment and the principles that this Court has consistently applied to assure its vitality provide an exception to the common law rules of issue preclusion applicable to state agencies merits review by the Court.

II. The Conflict Among the Courts of Appeals as to Whether Unreviewed Legal Conclusions of State Agencies Must be Given Collateral Estoppel Effect in Subsequent Actions Under 42 U.S.C. § 1983 Presents Important Unresolved Questions.

This Court's opinion in Elliott is carefully confined to the unreviewed factfinding of state administrative agencies. 92 L.Ed.2d at 645-46. The court of appeals in this case, however, stated that "The Court in Elliott does

not articulate a distinction between issues of fact and law in applying preclusion principles to administrative proceedings." 839 F.2d at 634 n.2; Appendix at 19. The Court of Appeals for the Ninth Circuit held that petitioner was barred from raising his first amendment claims in this § 1983 action despite the fact that respondents stipulated in district court that petitioner was fired from his job solely for reasons related to his speech to the council and city officials. Ibid. Thus, the court of appeals held that Elliott applies to both findings of fact of local agencies as well as questions of law.[8]

In Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987), the Court of Appeals for the Eight Circuit clearly observed that

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[8] See also, Button v. Harden, 814 F.2d 382 (7th Cir. 1987)(dicta).

"Elliott directs that a state agency's factfinding is to be given preclusive effect in a subsequent § 1983 action." Id. at 746. Thus the court held that issue preclusion does not apply when the "disputed issue ... is one of law," ibid. (Emphasis added.) The Eighth Circuit unlike, the Ninth, refused to extend Elliott to legal questions interpreting the federal constitution decided by a state administrative agency.[9] [10]

Since 1980 this Court has resolved a series of questions concerning issue preclusion and claim preclusion doctrines

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[9] See also, Gjellum v. City of Birmingham, 829 F.2d 1056, 1068 (11th Cir. 1987) (dicta); Anderson v. Babb, 632 F.2d 300 (4th Cir. 1980).

[10] The legal issue in Peery involved application of this Court's decision in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), concerning the right to procedural due process prior to termination from public employment.

as applied in the context of § 1983 cases. Allen v. McCurry, supra; Haring v. Prosise, supra; McDonald v. City of West Branch, supra; Migra v. Warren County Bd. of Ed., supra; and Elliott v. University of Tennessee, supra. Elliott extended the doctrine to a whole new class of cases -- unreviewed determinations of state agencies acting in a quasi-judicial capacity when the state courts would give collateral estoppel effect to the determination. It is extremely important for the lower federal courts as well as potential litigants to know whether Elliott extends to questions of law, or whether as the language of Elliott indicates, and the Eighth Circuit has held, the doctrine is limited to agency findings of fact.

Although local administrative bodies acting in a judicial capacity may be

equipped and competent to decide some traditionally factual issues, they are not inevitably and necessarily competent to decide purely legal issues interpreting the federal constitution.

Resolution of whether Elliott precludes federal district court's from considering legal questions previously raised in unreviewed state administrative proceedings is essential.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 16, 1988

(Appendix follows)

APPENDIX TO PETITION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mark Eilrich,	)	
	)	
Plaintiff-Appellant,	)	No. 86-2940
	)	
v.	)	D.C.
	)	CV-F-85-635-REC
	)	
Bernard J. Remas, et al.	)	
	)	OPINION
Defendant-Appellees.	)	
	)	

Appeal from the United States District Court for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
October 7, 1987--San Francisco, California

Filed February 17, 1988

Before: Otto R. Skopil, Jr. and Dorothy W. Nelson, Circuit Judges, and Diarmuid O'Scannlain,* Circuit Judge

Opinion by Judge Nelson

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* Judge O'Scannlain was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record and listened to the tape of oral argument held on Oct. 7, 1987.

* * * *

OPINION

NELSON, Circuit Judge:

Appellant Mark Eilrich, a municipal police officer was discharged by the City of Riverbank ("the City") after making statements about a controversy within the police department to the Riverbank City Council. A city administrative hearing officer, in upholding Eilrich's discharge, determined that the statements were not protected by the first amendment. The district court granted summary judgment for the City, finding that collateral estoppel barred Eilrich's claim for relief under 42 U.S.C. § 1983 (1982). The district court had jurisdiction pursuant to 28 U.S.C. § 1343 (1982). We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We affirm.

BACKGROUND

The City discharged Eilrich on November 21, 1984 in response to statements he made as a representative of the Riverbank Police Officer's Association at a city council meeting. Eilrich was discharged for making the following statements, which were part of one speech delivered during the public business portion of the meeting:

> 1. "Chief Remas has recently commended in the local news media, in response to our publicly made unanimous 'no confidence' vote of his, ah, management practices, that it is his belief that the Riverbank Police Department is currently 'strong and viable' as an organization. It is our equally strong belief, as the actual members of the organization which he is describing, that his contention is simply false."
>
> 2. "Over the past several years it has been the policy of the Chief of Police to cause dismissal of traffic citations in the interest of justice."

3. "This practice is an unethical use of the Chief's power for his own personal or political purposes."

4. "There's been a misappropriation of public funds or time by favored members of the Police Department and although this was brought to the attention of the Chief of Police, no action was taken."

5. "Since our attendance at the last Council meeting and resulting local publicity, members of our association have been threatened with job action if they persisted in communicating with the media."

6. "There have been grievances filed through the Chief of Police up to the City Administrator, and not on every particular item."

The City discharged Eilrich, alleging that the statements constituted (1) insubordination; (2) dishonesty; and (3) failure to follow specific grievance procedures. Eilrich appealed his discharge pursuant to Cal. Gov't Code

§ 3304(b) (West 1980) and the City's Merit System Rules and Regulations ("the City Rules"). The hearing officer, a retired California Superior Court judge, held a 14-day proceeding. The hearing officer had adjudicatory power to resolve all the disputed issues submitted by the parties pursuant to Cal. Gov't Code §§ 11513 & 19570, et seq., (West 1980 & Supp. 1987) and the City Rules. On May 1, 1985, the hearing officer found that the City had not proved that Eilrich violated the City Rules by speaking to the city council rather than following the formal grievance procedures. However, the officer upheld Eilrich's discharge on the grounds of insubordination and dishonesty. He found that Eilrich made the statements at issue; that they constituted insubordination; and that they were

"false and were made wilfully, recklessly, and irresponsibly." The hearing officer determined that the statements were not protected by the first amendment because he found, after examining the factual circumstances surrounding the statements, that the City's interest in efficient functioning of the police force outweighed Eilrich's interest in expressing his views on a matter of public concern.

After the decision, the City Attorney immediately sent a letter notifying Eilrich that judicial review of this determination by a California superior court was available. However, the administrative decision became final when Eilrich failed to appeal within the statutory period. See Cal. Civ. Proc. Code §§ 1094.5, 1094.6 (West 1980). Eilrich subsequently filed a 42 U.S.C.

§ 1983 action in the district court on November 14, 1985, claiming that the appellees impermissibly discharged him for exercising his first amendment rights. On November 10, 1986, the district court granted the City's motion for summary judgment, finding that collateral estoppel barred consideration of the claim because the scope of protection afforded the statements by the first amendment had been determined in the prior proceeding. Eilrich timely appealed.

ISSUE PRESENTED

Whether collateral estoppel bars consideration of Eilrich's 42 U.S.C. § 1983 claim because the same issues were resolved in a prior unreviewed administrative determination.

STANDARD OF REVIEW

The availability of collateral

estoppel is a mixed question of law and fact which this court reviews de novo. Davis & Cox v. Summa Corp., 751 F.2d 1507, 1519 (9th Cir. 1985). If collateral estoppel is available, this court reviews the district court's decision giving preclusive effect to the determination of the municipal hearing officer for abuse of discretion. See Plaine v. McCabe, 797 F.2d 713, 718 (9th Cir. 1986).

DISCUSSION

I. THE AVAILABILITY OF COLLATERAL ESTOPPEL

Collateral estoppel, or "issue preclusion", requires that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). Federal courts must give preclusive effect to state court reviewed administrative determinations under 28 U.S.C. § 1738, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985), and to unreviewed administrative findings under federal common law rules of preclusion. University of Tennessee v. Elliott, 106 S.Ct. 3220, 3224 (1986). In Elliott, the Court held that state administrative proceedings must be given the same preclusive effect they would be given in that state when an administrative agency, "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate

opportunity to litigate." 106 S.Ct. at 3227 (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)).

Eilrich argues that the administrative decision was not preclusive because it was not reviewed by the California courts. Under California law, a discharged police officer is entitled to de novo judicial review of administrative agency determinations. See Cal. Civ. Proc. Code § 1094.5 (West 1980); Perea v. Fales, 39 Cal.App.3d 939, 114 Cal.Rptr. 808 (1974). Eilrich failed to seek review by the California courts even though he was advised of its availability. "If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by

foregoing [the] right to appeal." Plaine, 797 F.2d at 719 n.12. In Plaine, we applied preclusion in similar circumstances when an appellant failed to seek judicial review by the California courts. Likewise, the discharged employee in Elliott failed to appeal an administrative determination through the state courts, 106 S.Ct. at 3223, and the Court applied collateral estoppel to bar his § 1983 claim even though the prior determination was unreviewed. Id. at 3225-26.

Eilrich relies on a Ninth Circuit case applying federal common law principles of collateral estoppel to argue that unreviewed administrative findings do not merit preclusive effect. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986). Such reliance is misplaced because the

court in Mack declined to give an unreviewed administrative hearing preclusive effect primarily because the plaintiff had had no opportunity to litigate his age discrimination claim, applying the Utah Construction standard. Id. at 1283. The nature of the unemployment compensation hearing had denied him the opportunity to litigate his claim and it was unclear if any evidence at all on the issue of age discrimination had been presented. Id. at 1283-84.

Eilrich also argues that this court should distinguish between according preclusive effect to state and municipal administrative determinations. Federal courts afford preclusive effect to state determinations because of comity and finality concerns. Elliott, 106 S.Ct. at 3226-27. The finality interests in

according preclusive effect to both types of determinations are identical. Although the comity interests in affording preclusive effect to municipal and state determinations are not identical, respecting a state court system for review of administrative decisions is furthered by applying collateral estoppel to Eilrich's claim. If collateral estoppel is not applicable to unreviewed municipal decisions, litigants will be encouraged to avoid state court review of municipal administrative determinations in order to obtain federal review of their claims. Looking to California preclusion law, as the Supreme Court instructed in Elliott, we find support for this conclusion. California courts accord collateral estoppel effect to municipal administrative hearings that have

sufficient judicial safeguards. See, e.g., City & County of San Francisco v. Ang, 97 Cal.App.3d 673, 679, 159 Cal.Rptr. 56, 59 (1979).

Thus, Eilrich's argument must fail if the administrative hearing meets the standards of California law, incorporating the Utah Construction standard.[1]

II. THE DISTRICT COURT'S APPLICATION OF CALIFORNIA LAW

The district court did not abuse its discretion in precluding relitigation of Eilrich's first amendment issue in the

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[1] The Ninth Circuit found in Mack that, as a matter of federal common law, preclusion did not apply because the administrative hearing failed to meet the Utah Construction threshold. 798 F.2d at 1283-84. The court thus found it unnecessary to reach California law. Id. at 1283 n.4. In Plaine, this court found that because California law incorporates the Utah Construction standard, no scrutiny beyond California law is necessary. 797 F.2d at 719 n.13.

§ 1983 action because the municipal administrative proceeding would have been given collateral estoppel effect under California law.

The California Supreme Court has established a two-part test to evaluate the preclusive effect to accord administrative agency determinations. People v. Sims, 32 Cal.3d 468, 186 Cal.Rptr. 77, 651 P.2d 321 (1982). The first part of the Sims test employs the standard the United States Supreme Court set out in Utah Construction: collateral estoppel should be applied "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Utah Construction, 384 U.S. at 422, quoted in Sims, 32 Cal.3d at 479, 186 Cal.Rptr.

at 83, 651 P.2d at 327-28. The second part entails traditional collateral estoppel criteria, barring relitigation of an issue if:

> (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].

Id. at 484, 186 Cal.Rptr. at 87, 651 P.2d at 331 (quoting People v. Taylor, 12 Cal.3d 686, 691, 117 Cal.Rptr. 70, 73, 527 P.2d 622, 625 (1974).

In Sims, the California Supreme Court found that a California Department of Social Services hearing had preclusive effect in a subsequent criminal prosecution for welfare fraud because it was "a judicial-like adversary

proceeding" conducted pursuant to Cal. Welf. & Inst. Code § 10950 (West 1980). 32 Cal.3d at 479, 186 Cal.Rptr. at 83, 651 P.2d at 328. Similarly, in the present case, Eilrich was afforded a 14-day proceeding resembling a trial, documented by an eleven-volume transcript. Under Cal. Gov't Code § 11513, both sides were entitled to call, examine and cross-examine witnesses under oath or affirmation. At the hearing, both parties were represented by counsel, twenty-one sworn witnesses testified, subpoenas were issued, and both parties presented oral argument and written memoranda. Both sides briefed the first amendment issue, the hearing officer considered these arguments and applied the appropriate legal standards to the facts surrounding Eilrich's statements and discharge. In addition, because the

hearing officer applied an established rule to specific existing facts rather than establishing a rule of law applicable to future cases, he acted in a judicial capacity. See Sims, 32 Cal.3d at 480, 186 Cal.Rptr. at 84, 651 P.2d at 328; Mack, 798 F.2d at 1283. Clearly, Eilrich had an adequate opportunity to litigate his first amendment claim with these procedures. See Plaine, 797 F.2d at 720 (upholding application of collateral estoppel to a similar California Corporations Commissioner's determination under the Sims test).

The facts of this case are clearly distinguishable from those in Mack, where we could not determine from the record whether any evidence on the plaintiff's age discrimination claim had even been presented. 798 F.2d at 1283-84. Thus, the determination satisfies the Utah

Construction standard because the hearing officer acted in a judicial capacity and the parties had adequate opportunity to litigate the first amendment issue. The traditional collateral estoppel criteria applied in the second part of the Sims test were also met because Eilrich was a party to the prior proceeding and the officer made a determination on the merits of the first amendment claim that became final when Eilrich failed to seek judicial review in the California courts.[2]

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[2] Eilrich argues that Utah Construction and Elliott apply preclusive effect only to administrative determinations of disputed facts. Because the parties stipulated that he was fired solely for the reasons contained in the Notice of Termination, he argues that no factual disputes are involved. The Court in Elliott does not articulate a distinction between issues of fact and law in applying preclusion principles to administrative proceedings. Further, collateral estoppel has been expanded in recent decades to preclude determinations

Eilrich also contends that the Sims test was not met because the issue determined in the administrative proceeding is not identical to that involved in his § 1983 claim. See Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1357 (9th Cir. 1985) (en banc); Amador v. Unemployment Ins. Appeals Bd., 35 Cal.3d 671, 684-85, 200 Cal.Rptr. 298, 306, 677 P.2d 224, 232 (1984). Eilrich attempts to avoid collateral estoppel by deleting several

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of law as well as of fact. 4 K. Davis, Administrative Law § 21, 15 51 (2d ed. 1983). The first restatement of judgments distinguished between questions of law and questions of fact but the second restatement expressly applies collateral estoppel to both types of questions. See Restatement (First) of Judgments §§ 68, 70 (1942); Restatement (Second) of Judgments § 27 (1982). Similarly, California law does not distinguish between determinations of fact and law in evaluating administrative proceedings for preclusion purposes except in narrow circumstances which are not applicable here. See infra p. 12.

of the statements considered by the hearing officer from the § 1983 action and substituting one statement for a similar one considered in the administrative hearing. He argues that because the hearing officer considered a slightly different substantive set of statements, and because each statement was not separately analyzed, the district court could not rely on the hearing officer's finding that all the statements were not protected by the first amendment.

However, the six statements are all part of one speech and the legal standard required the hearing officer to applying a balancing test, looking at the circumstances surrounding Eilrich's speech and discharge. The hearing officer thoroughly examined each of the six statements separately, listing the

reasons he found them unprotected by the first amendment. The hearing officer conducted the same balancing test which would be applied to Eilrich's claims in a § 1983 action and found the City's interests in maintaining efficient public service by minimizing disruption and preventing the undermining of the police chief's authority outweighed Eilrich's interest in expression on matters of public concern. See, e.g., Connick v. Myers, 461 U.S. 138 (1983); Franklin v. Leland Stanford Jr. Univ., 172 Cal.App.3d 322, 218 Cal.Rptr. 228 (1985). Thus, the hearing officer and the district court had the same expressive conduct before them and the hearing officer actually and necessarily decided the identical issue. See Sims, 32 Cal.3d at 485, 186 Cal.Rptr. at 87, 651 P.2d at 332.

Eilrich's argument must fail because

it would allow a party to evade collateral estoppel in a subsequent action by merely changing the statements to be considered, although they arise from the same factual circumstances and the legal standard requires an overall examination of those circumstances. Condoning such strategic evasion would thwart the policies underlying collateral estoppel: "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." Taylor, 12 Cal.3d at 695, 117 Cal.Rptr. at 76, 527 P.2d at 628.

California courts have created an exception to collateral estoppel to allow relitigation of a question of law when

injustice would otherwise result. See, e.g., Rutherford v. State, 188 Cal.App.3d 1267, 1285, 233 Cal.Rptr. 781, 790-91 (1987) (unclear if issue was actually resolved where appellate department reversed without an opinion); Restatement (Second) of Judgments § 28 (1982). However, this court has upheld a California court's refusal to apply this exception in circumstances similar to those of Eilrich. Clark v. Yosemite Community College Dist., 785 F.2d 781, 788 (9th Cir. 1986). In Clark, claim preclusion applied to bar federal court litigation of a discharged professor's § 1983 claim after a state court judgment. This court did not find manifest injustice in the situation or a legal issue of public importance to justify relitigation in the primarily factual determination upholding the

professor's discharge for expressive conduct. See also Carmel Valley Fire Protection Dist. v. State, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, 803 (1987); Ang, 97 Cal.App.3d at 679, 159 Cal.Rptr. at 59.

Allowing relitigation of Eilrich's claims would encourage litigants to forego state court review to receive federal review in § 1983 actions. This result would contravene the dictate of Elliott, where five Justices determined that § 1983 claims did not necessarily mandate a federal forum.

We affirm because the district court did not abuse its discretion in finding that the administrative hearing would be accorded preclusive effect in California courts.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARK EILRICH, Plaintiff,	)	NO. CV-F-85-635 REC
v.	)	DECISION AND ORDERS RE CROSS MOTIONS FOR SUMMARY JUDGMENT
BERNARD J. REMAS, et al., Defendants.	)	

On October 20, 1986, the court heard the parties respective cross-motions for summary judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the court enters its order denying plaintiff's motion and granting defendant's motion for the reasons set forth herein.

These cross-motions for summary judgment involve the application of issue preclusion or collateral estoppel to this action resulting from an administrative hearing for the disciplinary appeal filed

by plaintiff following his termination as a police officer by the City of Riverbank on grounds of insubordination, dishonesty and violation of the City Merit System Rules and Regulations. Defendants seek preclusion and plaintiff opposes.

1. Timeliness and Waiver.

As a threshold, plaintiff argues that defendants' assertion of the affirmative defense of collateral estoppel is not timely and that they should be deemed to have waived that affirmative defense. See Harbeson v. Parke Davis, Inc., 746 F.2d 517, 529 (9th Cir. 1984). The Status Conference Order filed March 10, 1986 gave defendants leave to file an amended answer raising a collateral estoppel defense based on plaintiff's administrative appeal hearing following termination, giving defendants "thirty days from the date of this order to file said amendment." The

amended answer was filed on April 11, 1986 at 10:22 a.m., having been mailed on April 10, 1986.

While the court does not agree with defendants' contention that service of the amended answer was in fact in accordance with the court's order or that plaintiff has waived any objection by his failure to either seek entry of default or to file a motion to strike pursuant to Rule 12(f), Federal Rules of Civil Procedure, the court nonetheless is of the opinion that the untimeliness verges on a technicality and that the late filing in no way prejudiced the plaintiff. Accordingly, the court holds that defendants have not waived the affirmative defense of collateral estoppel.

2. Application of Collateral Estoppel to Administrative Hearing.

Citing United States v. Utah

Construction and Mining Company, 384 U.S. 394 (1966), University of Tennessee v. Elliott, ___ U.S. ___, 92 L.Ed.2d 635 (1986) and People v. Sims, 32 Cal.3d 468 (1982), defendants argue that the principles of claim and issue preclusion can apply to the decision of the Administrative Law Judge in the Merit System Appeal.

Plaintiff responds that application of collateral estoppel to unreviewed decisions of municipal administrative bodies is not required or permitted by the above-cited cases because they only apply to administrative decisions of federal or state agencies established under state or federal law. None of these cases, however, specifically addresses the issue raised by plaintiff.

In arguing that preclusion does not apply to decisions of municipal

administrative agencies, plaintiff, citing Amador v. Unemployment Insurance Appeals Board, 35 Cal.3d 671, 685 n.12 (1984), states that "[t]he California Supreme Court has expressly refused to decide whether collateral estoppel effect must be given to the findings of local personnel boards." Amador, id. states:

> Since the issues are not identical, it is not necessary to determine whether, as a general matter, a finding of a county civil service commission regarding a short suspension binds the ALJ and the board in a subsequent proceeding to determine eligibility for unemployment benefits.

In the court's opinion, however, this footnote from Amador means nothing with regard to the resolution of the issue before the court and certainly does not constitute an indication as to the position on the merits of this issue by the California Supreme Court.

Plaintiff further argues that "[t]he decision in People v. Sims, 32 Cal.3d 468 (1982) which gives collateral estoppel effect to a state Department of Social Services hearing concerning eligibility for welfare benefits is expressly confined to that situation. To our knowledge the case has not been extended to decisions of local agencies."

Again, the court does not read anything in the pertinent portion of Sims, id. at 476-483, which specifically limits that case to decisions of state administrative agencies. In fact, Sims at 478 cites City and County of San Francisco v. Ang, 97 C.A.3d 673 (1979) without disapproval. In Ang, the Court of Appeal gave preclusive effect in a collateral civil proceeding of a zoning issue previously decided by a city board of permit appeals. Moreover, Sims, id. at

479-480 n.8 stated:

> The fact that statewide and local administrative agencies are prohibited from exercising 'judicial power' by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29]; Standard Oil Co. v. State Board of Equal. (1936) 6 Cal.2d 557 [59 P.2d 119].) This distinction was not recognized by Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33 [168 P.2d 686], upon which the people rely for the proposition that collateral estoppel is not applicable to administrative agency decision. In Empire Star Mines the court found a decision of the California Employment Commission not to be binding in a subsequent court proceeding because the commission did not exercise 'judicial power' under the Constitution. (Id., at p. 48.) The court did not determine whether the commission's proceedings were judicial in nature. The analysis of Empire Star Mines is inconsistent with that conducted in Hollywood Circle, Utah Construction, and the instant case. So that the law if free

> from ambiguity in this area, Empire Star Mines is overruled to the extent that it conflicts with this opinion.

Plaintiff further argues that Taylor v. New York City Transit Authority, 433 F.2d 665 (2d Cir. 1970), cited by defendants and which gives preclusive effect to a city administrative finding, is an aberration:

> [T]he case appears not to have gained a large following in the many years since it was decided and the case predates modern collateral estoppel analysis in connection with § 1983 actions. Significantly, New york Court would have given collateral estoppel effect to Municipal and State Civil Service Commissions at the time that the Second Circuit decided Taylor v. New York City Transit Authority. See Taylor v. New York City Transit Authority, 309 F.Supp. 785, 791 (E.D.N.Y. 1970).

This argument is not persuasive to the extent it is comprehensible and plaintiff otherwise cites no authority supportive of his proposition that collateral estoppel

effect can only be given to administrative decisions of state agencies.

The court agrees in any event with defendants that the focus of inquiry in deciding whether or not preclusive effect should be given to an administrative decision is upon the procedure employed during the administrative process. Thus, in United States v. Utah Construction & Mining Company, supra at 421-422:

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Accord People v. Sims, supra at 479. Consequently, the court concludes that claim preclusion may apply to the

administrative decision at issue here.

3. De Novo Review.

Plaintiff recognizes that the Supreme Court in University of Tennessee v. Elliott, supra at 645-647, held in a Section 1983 action that when a state agency's procedures comport with Utah Construction and Mining Company, supra, the federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts. Citing, however, that portion of the Supreme Court's decision holding that from the language and legislative history of Title VII Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII Claims, id. at 644-645, plaintiff argues that a similar result must apply to plaintiff's First Amendment claims. Citing Holley v. Seminole County

School District, 755 F.2d 1492, rehearing denied, 763 F.2d 399 (11th Cir. 1985), plaintiff contends:

> It is inconceivable that the federal courts are bound to give preclusive effect to the findings of municipal hearing officers in first amendment cases. If appellate courts give de novo review to findings of lower federal courts, as well as state courts, concerning whether speech is protected or unprotected, then surely federal courts are not to be barred from giving the same type of de novo review to unreviewed municipal agency decisions.

In Holley, 755 F.2d at 1500-1504, the Eleventh Circuit held:

> [A] discharged or nonrenewed teacher asserting a claim of First Amendment right under Mt. Healthy is entitled to a de novo hearing in federal court regardless of whether that teacher resorted to an administrative hearing or whether such hearing purported to decide the constitutional issue. The policy enunciated by § 1983 in vesting original jurisdiction for constitutional claims in the district court requires no less.

Id. at 1504.[3] However, although not pointed out by plaintiff, Holley, 763 F.2d at 400-401 held:

> The petition for Panel Rehearing is DENIED. Appellees argue on rehearing that because appellant's constitutional claims were rejected by the Georgia State Board of Education, the federal full faith and credit statute, 28 U.S.C.A. § 1738, precludes litigation of those claims in federal court under the Supreme Court's analysis in Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). We note that § 1738 applies only to the preclusive effect of 'judicial proceedings' of state courts, , , , and, thus, would be inapplicable to proceedings in front of the Georgia State Board of Education. Nevertheless, the preclusive effect, in a 42 U.S.C.A. § 1983 case, of state administrative proceedings, by analogy to § 1738, is a difficult and

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[3] It should be noted that footnote 8 of plaintiff's brief concedes that Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) does not apply to this action.

> arguably open question in this circuit which may be subject to differing analyses depending on the character of the administrative proceeding and the type of claim being raised in the federal action.
>
> . . . However, since appellees did not brief or argue the applicability of § 1738 or any related doctrine of administrative preclusion in their briefs to this panel we will not entertain these thorny questions presented for the first time in appellees' petition for rehearing.

See also Sharpley v. Davis, 786 F.2d 1109, 1111-1112 (11th Cir. 1986). Moreover, res judicata has been applied pursuant to section 1738 in Section 1983 actions involving claims of termination in violation of First Amendment rights. Gahr v. Trammel, 796 F.2d 1063, 1068-1070 (8th Cir. 1986); Holmes v. Jones, 738 F.2d 711 (5th Cir. 1984); but see Stall v. Bourne, 774 F.2d 657 (4th Cir. 1985), opinion withdrawn, 783 F.2d 476 (4th Cir. 1985).

University of Tennessee v. Elliott was not based upon the application of Section 1738. The Supreme Court, however, referred to Allen v. McCurry and Migra v. Warren City School District Board of Education, which applied issue preclusion and claim preclusion, respectively, to Section 1983 actions pursuant to Section 1738, in concluding that collateral estoppel could apply to administrative decisions in Section 1983 actions, under the circumstances set forth herein infra. There is no indication in Elliott that its conclusion would not apply to a First Amendment claim. And see McCulty v. Rockefeller, 570 F.Supp. 1455, 1458-1461 (S.D.W.Va. 1983); see also Clark v. Yosemite Community College District, 785 F.2d 781, 788, 788 n.9 (9th Cir. 1986).

Consequently, the court concludes that plaintiff is not entitled to de novo

review of his First Amendment claim.

4. Application of Collateral Estoppel.

In Utah Construction & Mining Company, supra at 422, the United States Supreme Court held:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Here it is undisputed that a timely appeal to the Notice of Termination was filed by the plaintiff with the City of Riverbank. The notice was filed pursuant to California Government Code § 3304 and the Riverbank Merit System Rules and Regulations. The City Manager is designated by the City Merit Systems Rules and Regulations as the hearing officer for all disciplinary appeal hearings.

However, the plaintiff filed a written objection to the existing City Manager as the administrative hearing officer and, consequently, the Honorable Jean Morony, Superior Court Judge, Retired, was appointed as the administrative hearing officer for the disciplinary appeal filed by the plaintiff. Judge Morony was, by agreement, vested with full power and authority under the City Merit System Rules and Regulations and the California Government Code to resolve all disputed issues submitted by the parties. The administrative hearing on the Merit System Appeal commenced on March 12, 1985. The proceeding consumed fourteen hearing days. It was concluded and submitted to the hearing officer on April 16, 1985. During that period of time, twelve witnesses were sworn and called to testify by plaintiff, eleven witnesses were sworn and called

[to] testify by defendants, plaintiff introduced 29 exhibits, defendants submitted 51 exhibits, plaintiff and the City of Riverbank were at all times represented by counsel, the entire hearing was reported by a Certified Shorthand Reporter, and the administrative hearing was conducted pursuant to California Government Code §§ 11513 and 19580. Furthermore, civil discovery was requested by both sides during the hearing and was allowed by order from the administrative hearing officer and the right to confrontation and cross-examination of all witnesses was recognized throughout the hearing. Plaintiff was entitled to judicial review of Judge Morony's decision pursuant to California Code of Civil Procedure § 1094.5 although the time for review having expired, Judge Morony's decision is now final under Code of Civil

Procedure § 1094.6.

Plaintiff's only contention that the procedures set forth above do not comport with Utah Construction & Mining Company factors is his argument that the proceedings did not accord him due process of law because:

> In this case plaintiff received notice and the opportunity to be heard, but he received notice of one set of issues while the hearing officer proceeded to make a decision based upon another set of issues. . . . Since the hearing officer went beyond the scope of the issues presented in the notice of termination and held that additional facts justified the termination, plaintiff was not given a fair opportunity to litigate the first amendment questions presented by the notice of termination.
>
> Defendants have presented no evidence in their papers accompanying their motion for summary judgment indicating that the issues on the administrative appeal were expanded beyond the scope of the notice of termination. Indeed they concede that the notice of

> termination defined the issues. Therefore, the city hearing did not meet the fairness standards necessary to give the decision preclusive effect.

To the extent this argument is directed to the full and fair opportunity to litigate, plaintiff was represented by counsel throughout the Merit System Appeal. And, according to the undisputed averments in the Supplemental Declaration of Michael D. Milich in Support of Motion for Summary Judgment:

> 4. . . . [T]he plaintiff unilaterally raised the very issues that he now contends were extraneous to the decision by Judge Morony. . . .
>
> 5. Each of the statements discussed specifically by plaintiff in its opposition were raised by plaintiff in the context of its First Amendment arguments. . . . This evidence was met by the defendants with documentary and testimonial evidence. The issues were properly raised and fully developed by both sides during the hearing and were submitted to the hearing officer for a

> full, fair and final decision. Moreover, plaintiff at no time during the administrative hearing objected to the introduction of evidence pertaining to the above statement.[4]

Under these circumstances, the court concludes that plaintiff's argument that the Utah Construction & Mining Company factors were not satisfied herein is without merit. See, e.g., Baroid Division

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[4] At oral argument, plaintiff objected to the court's consideration of defendants' reply brief and Milich's supplemental declaration on the ground that they were not timely filed in accordance with Rule 230(d), Local Rules of Practice, they again being filed one day late. Plaintiff, however, pointed to no prejudice resulting to him from the late filing and the court itself was not inconvenienced in this instance. Given the importance of these cross-motions for summary judgment to the ultimate disposition of this action, the court will consider these pleadings. Defendants' counsel is cautioned, however, that compliance with the court's local rules is necessary not only to avoid potential prejudice to the opposing party and potential delays in ruling upon a matter but also in order that the court may be timely prepared to hear oral argument.

of NL Industries, Inc. v. Occupational Safety and Health Review Commission, 660 F.2d 439, 449 (10th Cir. 1981) ("'So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.'").

Plaintiff further argues that collateral estoppel cannot be applied because the issues adjudicated by Judge Morony in the Merit System Appeal are not identical to the issues raised in the action before the court.

Plaintiff cites People v. Sims, supra at 484 and Amador v. Unemployment Insurance Appeals Board, supra at 684 for the proposition that "[c]ollateral estoppel bars relitigation of an issue decided at a previous hearing only if the issue necessarily decided at the previous

proceeding is identical to the one which is sought to be relitigated." In Amador, the requisite identity of issues was not found because "[t]he issue of 'insubordination' under the county rules differs substantially from the issue of 'misconduct' under the code." Id. Conversely, Sims held that the fraud issue litigated at the DDS was identical to that involved in the criminal proceedings. Id. at 484-485. In the Merit System Appeal, plaintiff asserted in his Pre-Hearing Brief that his termination violated his First Amendment right to free speech. This issue was actually litigated in the Merit System Appeal. The complaint in this action alleges that plaintiff's termination violated his federal and state constitutional rights to free speech and freedom of assembly. Thus, at least to the extent that plaintiff's constitutional

claims are based on free speech, the issue is identical.[5] As generally noted supra, plaintiff's argument that the issues are not identical is predicated on his assertion that Judge Morony considered certain statements made by plaintiff which were not specifically listed in the Notice of termination in determining that plaintiff's termination did not violate his First Amendment rights to free speech. Because the Status Conference Order in the action before this court states that "[t]he parties agree that plaintiff was terminated solely for the reasons set forth in [the Notice of Termination] attached to the complaint[,]" plaintiff contends that the issues are not identical. At oral argument, plaintiff stated that he had agreed at the status

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[5] Neither of the parties discusses the freedom of assembly issue.

conference to a dismissal without prejudice of his claims that his termination without a pre-termination hearing violated due process within the meaning of the Fourteenth Amendment to the United States Constitution and Sections 7(a) and 15 of the California Constitution in exchange for the stipulation in the Status Conference Order set forth above. Plaintiff referring the court to Connick v. Myers, 461 U.S. 138 (1983), argues that "[a] proper focus on each of the offending statements is essential because each statement must be examined to determine whether it concerned a matter of public concern and whether it was protected under the First Amendment." This is, however, what Judge Morony did in the Merit System Appeal. The court does not see that collateral estoppel would be any less applicable because, by stipulation of the

parties, the statement to which collateral estoppel is sought in this action are less in number than those in fact considered by Judge Morony. Plaintiff cites no authority supportive of this position and the court's research has found none. There is no suggestion that the First Amendment claims with regard to the statements listed in the Notice of Termination were not decided by Judge Morony.[6]

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[6] Plaintiff also argues that California courts would not necessarily give preclusive effect here to the extent pure questions of law are involved and nonapplication is necessary to prevent manifest injustice. The court, however, is not persuaded that the circumstances here preclude application of collateral estoppel. The fact that plaintiff's claims are grounded in the First Amendment does not in and of itself constitute manifest injustice. See Clark v. Yosemite Community College District, 785 F.2d 781, 788 (9th Cir. 1986).

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is denied and that defendants' Motion for Summary Judgment is granted.

DATED: November 10, 1986.

/s/ Robert E. Coyle

ROBERT E. COYLE

United States District Judge

[FILED NOV 10 3:35 PM '86]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK EILRICH,

Plaintiff

V.

BERNARD J. REMAS,
et al,

Defendants

JUDGMENT IN A CIVIL CASE

CASE
NUMBER: CV F 85-635 REC

/ / Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/X/ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary judgment is Denied and that defendant's Motion for Summary Judgment is Granted.

November 12, 1986
Date

J.R. Grindstaff
Clerk

/s/ P. Mosqueda
(By) Deputy Clerk
P. MOSQUEDA

[FILED NOV 12 10:29 AM '86]